Supreme Court, U.S.
FILED
APR 11 1984
ALEXANDER L. STEVAS

No. 83-1357

In the Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN DISTRIBUTING COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board properly found that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by unilaterally discontinuing, upon expiration of the contract between petitioner and the Union, the pension fund contributions called for by the contract.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 715 F.2d 446. The decision and order of the National Labor Relations Board (Pet. App. A15-A30) are reported at 264 N.L.R.B. 1413.

JURISDICTION

The judgment of the court of appeals (Pet. App. A31) was entered on September 6, 1983. A petition for rehearing was denied on November 15, 1983

(Pet. App. A32). The petition for a writ of certiorari was filed on February 13, 1984. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, and of the Labor Management Relations Act, 29 U.S.C. 141 *et seq.*, are set forth at Pet. App. A33-A42.

STATEMENT

1. Petitioner and the Union [1] have been parties to a series of collective bargaining agreements since about 1954. Under these contracts, the parties established an employee pension plan funded by monthly contributions by petitioner to the Western Conference of Teamsters Pension Trust Fund. Pet. App. A18. Since at least 1971, petitioner has been dissatisfied with the contributions required by the contracts and has stated its dissatisfaction to the Union in every round of contract negotiations. Petitioner has agreed, however, to continue the contributions under each contract. Pet. App. A18-A19; Tr. 60, 66, 213-214, 218-219.[2] When the parties' contract expired in April 1977, petitioner continued to make the pension fund contributions called for by the expired contract until the parties reached agreement on a new contract in September 1977 (Tr. 216, 231-232).

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[1] Teamsters, Chauffeurs, Warehousemen & Helpers, Local 386.

[2] "Tr." refers to the transcript of the hearing before the administrative law judge. "GCX" refers to the General Counsel's exhibits at the hearing, and "RX" refers to the company's exhibits at the hearing.

Although petitioner had expressed dissatisfaction with the contractual contributions during the 1977 negotiations, the 1977 contract provided that petitioner would continue to make monthly contributions to the pension fund and also that it would sign a pension certification attached as part of the contract. During negotiations, petitioner's representatives stated that they were agreeing to the contributions only because of the threat of a strike and only for the term of the contract. Pet. App. A18-A19, A24. At their insistence, the contract omitted a clause proposed by the Union that would have provided that the pension agreement could not be modified or terminated without the written consent of the pension fund trustees. Also at petitioner's insistence, the pension certification provided that petitioner signed it "under protest as per the previous agreement." Pet. App. A16, A19; Pet. Supp. App. A44, A47. Both the collective bargaining agreement and the attached certification were to remain in effect until April 30, 1980; in addition, the collective agreement was to continue in effect from year to year thereafter unless either party gave the other written notice of a desire to modify or terminate it. Pet. App. A18; Pet. Supp. App. A45-A46; GCX 2, at 11.

In February 1980, petitioner notified the Union that it wanted to begin negotiations for a new contract. In late February and early April, Union negotiator John Souza met informally with two of petitioner's negotiators. They conveyed to Souza petitioner's longstanding concern about the pension contributions and stated that petitioner would propose replacing the pension plan with a profit-sharing plan and would discontinue the pension contributions upon expiration of the existing contract. Pet. App. A19-

A20; Tr. 209, 211-212. Souza replied that the Union did not have any proposals to make yet. In addition to his responsibility for the negotiations with petitioner, Souza was participating in negotiations with eight other employers and also was responsible for enforcing contracts with about 20 employers covering 1000 employees (Tr. 86, 138-139).

The parties began formal negotiations on May 1. At the beginning of the first session, in response to a question from Souza, company negotiator Robert Lee stated that petitioner was serious about discontinuing the pension contributions under the old contract. Souza submitted a list of proposals including increases in pension contributions, paid holidays and vacations, cost-of-living raises, and hourly wages. Pet. App. A20, A24-A25 & n.8; Tr. 251-252, 295, 299-300. Lee then stated that petitioner would propose a profit-sharing plan and that he would contact Souza when the proposal was ready (Pet. App. A20; Tr. 68, 145-146, 256, 302-304). Effective May 1, with no notice to the Union at that time or in subsequent negotiations, petitioner discontinued the pension contributions required by the expired contract (Pet. App. A20). The parties continued to negotiate in nine sessions from May to December. In nearly all the sessions the parties discussed the proposed replacement of the existing pension plan and submitted proposals and counterproposals involving either the proposed profit-sharing plan or the Union's desire to continue contributions at some level under the existing pension plan. Pet. App. A20, A22; Tr. 72, 119-121, 147-157, 274-275.[3]

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[3] Continued negotiations had not produced a new contract as of the Board's unfair labor practice proceedings in September 1981 (Tr. 73).

On a number of occasions from July to December, Northwest Administrators, the administrator of the pension fund, sent letters to petitioner and the Union stating that the fund had not received notice of renewal of the parties' contract and that the fund could not continue to accept contributions from petitioner unless it received a written contract signed by the parties (Pet. App. A20-A22, A27; RX 1-2, 4-6). On two occasions the Union responded that the parties were still negotiating (Pet. App. A22; Tr. 17-19, 80-81; RX 1). On September 23, petitioner sent a letter to the pension fund stating that it had not made contributions since May and that it did not intend to make contributions in the absence of a signed collective bargaining agreement. This was petitioner's first written notification to the fund that contributions under the contract had been discontinued. Petitioner did not send a copy of the letter to the Union. Pet. App. A20, A27. On November 21, Northwest Administrators notified both parties that it would not accept any contributions and would cancel the pension account unless it received a written contract within 30 days (Pet. App. A21-A22; RX 5-6).

On December 8, the Union sent a letter to petitioner stating that it had learned that pension contributions had not been made since expiration of the contract and demanding that petitioner "maintain all wages and conditions under the contract while negotiations continue" (Pet. App. A22; GCX 6). Late in December the Union received a delinquency report from the pension fund confirming that no contributions had been made from May through November. On December 29, the Union filed an unfair labor practice charge with the Board.

2. The Board, adopting the findings and conclusions of the administrative law judge, found that pe-

titioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(5) and (1), by unilaterally discontinuing, upon expiration of the existing collective bargaining agreement, the pension fund contributions required by the contract while negotiations for a new agreement were continuing. The Board rejected petitioner's contentions 1) that the Union waived its right to bargain about continuing the pension fund contributions during the 1977 negotiations and the 1980 preliminary negotiations; and 2) that because no written pension agreement or certification existed after expiration of the existing contract, petitioner was prohibited from continuing the established contributions by Section 302 of the Labor Management Relations Act (LMRA), 29 U.S.C. 186 (Pet. App. A22-A26).[4] The Board ordered petitioner to make all pension fund contributions required under the expired agreement "which have not been paid, and which would have been [paid] absent [petitioner's] unlawful unilateral discontinuance[,]" and to continue the payments until the parties reached either a new agreement or impasse (Pet. App. A28).

3. The court of appeals enforced the Board's order. The court held that substantial evidence supported the Board's conclusion that the Union had not waived the right to bargain on pension contributions during either the 1977 negotiations or the 1980 negotiations (Pet. App. A5-A8, A13-A14).[5] In addition,

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[4] The Board also rejected petitioner's claim that the Union's unfair labor practice charge was untimely under Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b) (Pet. App. A26-A27).

[5] Before the Board and the court of appeals, petitioner argued that three factors showed that in the 1977 agreement the Union had waived its right to bargain over contributions: 1)

the court found that the Board had properly rejected petitioner's claim based on Section 302 of the Labor Management Relations Act. The court stated (Pet. App. A8-A9):

> Under section 302 of the LMRA, an employer may make payments to a pension fund and the trust may accept them only if "the detailed basis on which such payments are to be made is specified in a written agreement with the employer." 29 U.S.C. § 186(c)(5)(B). * * *
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> * * * * *
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> Because a written agreement—the expired contract—specified the basis on which the Company

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the pension certification stated that it would expire when the collective bargaining agreement terminated; 2) petitioner successfully blocked a contractual provision that would have required pension trustee approval before stopping contributions; and 3) petitioner stated to the Union that it would make contributions only for the life of the 1977 agreement (Pet. App. A5-A6). The Board held, and the court agreed, that the language of the pension certification "does no more than ministerially attach to the enabling collective bargaining agreement" and did not abrogate the Union's statutory right to bargain over contributions; that rejection of the trustee approval clause did not affect petitioner's obligation to bargain with the Union; and that petitioner's statements in the 1977 negotiations were merely "loose verbalisms" in light of the parties' bargaining history (Pet. App. A5-A6, A25-A26).

In addition, petitioner argued that the Union's alleged failure to object to petitioner's statements of intent to discontinue contributions early in the 1980 negotiations constituted a waiver by inaction (Pet. App. A7). However, the Board found, and the court of appeals agreed, that these statements were insufficient to give clear notice to the Union and that the Union's failure to make an immediate objection was not a waiver in light of the parties' bargaining history (Pet. App. A7-A8, A13-A14, A25).

was legally obligated to make contributions, the literal language and underlying purpose of section 302 has been satisfied.[6]

ARGUMENT

Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), which makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees," precludes an employer from unilaterally changing terms and conditions of employment that constitute mandatory subjects of bargaining. *NLRB* v. *Katz*, 369 U.S. 736, 742-743 (1962); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 209-210 (1964). It is well-settled that the terms of a collective bargaining agreement define the status quo with respect to working conditions, and that an employer is required to maintain that status quo upon expiration of the agreement until the parties reach a

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[6] The court also held that the Board had properly rejected petitioner's claim that the Union's charge was untimely under Section 10(b), 29 U.S.C. 160(b) (Pet. App. A10-A11). In addition, the court rejected petitioner's contention that the Board's remedial order violated due process by requiring petitioner to continue making contributions in the face of the pension fund's November 21, 1980 notice that it would not accept further contributions after December 21, 1980 unless it received a written contract from the parties. The court held that the Board's remedial order required payment of only those contributions that would have been made absent the unlawful discontinuance, and that it was open to the company to show in a compliance proceeding following enforcement of the Board's order that it would not have been required to make payments that would not have been accepted by the trust fund (Pet. App. A11-A12).

Petitioner does not press either the Section 10(b) or due process claim before this Court.

new agreement or bargain to an impasse. *NLRB* v. *Cauthorne*, 691 F.2d 1023, 1025 (D.C. Cir. 1982); *NLRB* v. *Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981). Petitioner nonetheless contends that it was privileged by Section 302 of the LMRA, 29 U.S.C. 186, unilaterally to cease its pension fund contributions upon expiration of the parties' collective agreement and that, in any event, the Union waived its right to bargain over contributions when the contract expired. These contentions were properly rejected by the Board and the court below and do not warrant review by this Court.

1. Section 302(c)(5)(B) of the LMRA, 29 U.S.C. 186(c)(5)(B), makes its unlawful for an employer to contribute money to an employee trust fund unless "the detailed basis on which such payments are to be made is specified in a written agreement with the employer." Contrary to petitioner's contention (Pet. 6-14), however, where, as here, the basis for the contributions is adequately set forth in a collective agreement, Section 302(c) does not relieve an employer of its obligation to continue the payments merely because the agreement has expired. It is well settled that pension, health, and welfare plans provided for by contract constitute terms and conditions of employment that survive the expiration of the contract and cannot be altered without bargaining. *NLRB* v. *Cauthorne*, 691 F.2d at 1024-1025; *NLRB* v. *Carilli*, 648 F.2d at 1213-1214; *Harold W. Hinson d/b/a Henhouse Market No. 3*, 175 N.L.R.B. 596 (1969), enforced, 428 F.2d 133 (8th Cir. 1970). Accordingly, it is equally well settled that an expired contract that establishes the existing level of employee benefits satisfies the requirements of Section 302(c)(5)(B) of the LMRA that "payments are to be made as

specified in a written agreement." *Producers Dairy Delivery Co.* v. *Western Conference of Teamsters Pension Trust Fund*, 654 F.2d 625, 627 (9th Cir. 1981); *NLRB* v. *Carilli*, 648 F.2d at 1213-1214; *Peerless Roofing Co.* v. *NLRB*, 641 F.2d 734, 736 (9th Cir. 1981); *Denver Metropolitan Ass'n of Plumbing & Heating Contractors* v. *Journeyman Plumbers & Gas Fitters Local No. 3*, 586 F.2d 1367, 1373 (10th Cir. 1978); *Hinson* v. *NLRB*, 428 F.2d 133, 139 (8th Cir. 1970). The congressional intent behind the requirement of a written agreement is "to allow each employee to know and to have a basis for enforcing his rights, and to eliminate discretion in union leaders to direct the funds." *Denver Metropolitan Ass'n*, 586 F.2d at 1372. Reliance on the terms of the prior contract effectuates these objectives.

Petitioner's reliance on *Moglia* v. *Geoghegan*, 403 F.2d 110 (2d Cir. 1968), cert. denied, 394 U.S. 919 (1969) (Pet. 10-11, 13-14) is misplaced. In *Moglia*, the parties had never executed an agreement of any kind governing pension contributions. Here, by contrast, the basis for petitioner's pension contributions was specified in a written agreement—the expired contract and attached pension certification. Pet. App. A9; see *Peerless Roofing*, 641 F.2d at 736 n.2.[7]

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[7] Contrary to petitioner's contention (Pet. 10-12), the fact that a separate trust agreement remained in effect after expiration of the collective bargaining contract in *Hinson*, 428 F.2d at 139, and *Peerless Roofing*, 641 F.2d at 736, does not render the reasoning of those cases inapplicable here. Rather, it is apparent from both the logic and language of those decisions that the employer's obligation under the Act to continue the contributions established in the expired collective agreement was a separate and sufficient ground for meeting the requirements of Section 302. *Hinson*, 428 F.2d at 139, and *Peerless Roofing*, 641 F.2d at 736; see also *NLRB* v.

2. Petitioner contends (Pet. 14-25) that the Union waived its right to bargain about continuing pension contributions in both the 1977 contract and the 1980 negotiations. The Board found that the evidence failed to establish a clear and unmistakable waiver under settled legal principles, and the court held that substantial evidence supported the Board's conclusion. Review by this Court of the Board's application of settled principles to particular facts is not warranted. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).[8]

Carilli, 648 F.2d at 1213-1214; *Denver Metropolitan Ass'n*, 586 F.2d at 1373. Moreover, in *Producers Dairy Delivery Co.*, the court held that an employer's obligation to make contributions pursuant to an expired collective agreement satisfied the requirements of Section 302 where there was no separate trust agreement of any kind. 654 F.2d at 627.

In addition, as the court of appeals correctly concluded, there is no merit to petitioner's claim (Pet. 13) that the notices from the pension fund administrator relieved petitioner of its statutory obligation to maintain contributions negotiated by the Union. The Union, a wholly separate entity from the fund and its administrator, was not bound by the notices; moreover, the notices do not demonstrate that Section 302 required petitioner to discontinue the contributions. Rather, as the court of appeals found (page 8 note 6, *supra*), the notices are relevant only insofar as petitioner may be able to demonstrate in a compliance proceeding that certain specific contributions might not have been accepted by the fund. Pet. App. A9, A11-A12.

[8] In any event, there is ample support in the record for the Board's conclusion. With respect to the 1977 contract, the evidence shows no more than that the Union agreed that both the contract and the pension certification would expire on April 30, 1980, and that the parties would omit a clause requiring the fund trustees to approve any changes in the fund. These agreements did not abrogate petitioner's statutory obligation to maintain the status quo absent a bargaining impasse during the 1980 negotiations that followed the expira-

tion of the agreement. Indeed, even if the clause that the Union abandoned could be construed as an attempt to guarantee that petitioner would not discontinue contributions without the Union's approval, it is settled that the abandonment of an attempt to obtain a contractual guarantee of a statutory right does not waive that right. *NLRB* v. *Southern California Edison Co.*, 646 F.2d 1352, 1366 (9th Cir. 1981); *General Electric Co.* v. *NLRB*, 414 F.2d 918, 924 (4th Cir. 1969), cert. denied, 396 U.S. 1005 (1970); *Timken Roller Bearing Co.* v. *NLRB*, 325 F.2d 746, 750-751 (6th Cir. 1963), cert. denied, 376 U.S. 971 (1964).

Petitioner's reliance on *Cauthorne Trucking*, 256 N.L.R.B. 721, 722 (1981), remanded on other grounds, 691 F.2d 1023 (D.C. Cir. 1982) (Pet. 17) is misplaced. In *Cauthorne*, the pension agreement expressly stated that "at the expiration of any * * * collective bargaining agreement * * * the * * * Company's obligation under [the] Pension Trust Agreement shall terminate unless, in a new * * * agreement, such obligation shall be continued." Such language constitutes more convincing evidence of an intent to waive the right to bargain than does the language here, which stated no more than that the contract and the pension certification were to expire on the same day (Pet. Supp. App. A46).

With respect to the 1980 negotiations, petitioner contends that it gave the Union notice of its intent to discontinue contributions and that the Union failed to object or attempt to bargain, thereby waiving its right under the Act. Contrary to petitioner's claim, the Board reasonably concluded that petitioner's statements about discontinuing the contributions did not constitute a clear notice of intent to depart from past practice in light of its prior protests and its willingness to continue contributions during previous negotiations. Moreover, the statements were made at informal sessions before formal negotiations began and at a time when the Union was still formulating its own proposals and the Union's chief negotiator was involved in negotiations with a number of other employers (page 4, *supra*). In addition, the Union and petitioner continued to bargain over pensions, offering proposals and counterproposals throughout the negotiations. Pet. App. A7-A8, A13-A14, A20, A22, A24-A25; Tr. 72, 119-121, 147-151, 274-275. Thus, the cases cited by petitioner at Pet. 22-24 & n. 14 are simply inapposite because, unlike the present

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1984

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case, they involved inaction by a union in the face of clear notice from an employer.

Finally, contrary to petitioner's claim (Pet. 22), the Board has not announced a "new rule" requiring only formal written notice that satisfies the union's subjective judgment before it will find a waiver by inaction; rather, the Board held merely that, in light of all the objective circumstances, including the parties' bargaining history, petitioner's statements amounted only to "opposition rhetoric on [a] long-festering topic" and not to clear an unequivocal notice of an intent to discontinue contributions to the fund (Pet. App. A25 n. 8).

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